

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
EDWARD A. COON,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 79-74

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal from the denial of an application for the appropriation of surface water, came before the Pollution Control Hearings Board, Nat W. Washington, Chairman, Chris Smith and David Akana (presiding) at a formal hearing in Yakima on October 10, 1979.

Appellant was represented by his attorney, Patrick J. Morrissey; respondent was represented by Laura E. Eckert, Assistant Attorney General.

Having heard the testimony, having examined the exhibits, having considered the contentions of the parties and having considered the

1 exceptions filed by the appellant and respondent, the Board makes thes.

2 FINDINGS OF FACT

3 I

4 In February of 1974, appellant Edward Coon submitted Surface Water  
5 Application No. S3-22567 to the respondent, Department of Ecology, for  
6 the use of 0.4 cubic foot per second (cfs) from Nicholson Creek, a  
7 small intermittent tributary to Toroda Creek (a perennial stream) in  
8 northern Okanogan County, Washington. Toroda Creek receives drainage  
9 from over a 200 square mile relatively arid area.

10 II

11 Appellant owns property at the confluence of Nicholson and Toroda  
12 Creeks. He sought to appropriate water for rill irrigation of 20  
13 acres during the period April 15 to August 30 of each year. His  
14 permit application was denied by the department because the proposed  
15 use of water would be detrimental to the public interest. The denial  
16 was appealed to this Board.

17 III

18 During consideration of appellant's application, the Department  
19 discovered that Nicholson Creek was tributary to Toroda Creek, which  
20 had been administratively closed to further appropriation of surface  
21 water at the request of the Washington State Department of Game since  
22 the early 1950's. Nicholson Creek supplies Toroda Creek through  
23 surface flow (intermittent) and ground water flow (continuous). The  
24 Department of Game considers, and evidence shows, that Toroda Creek is  
25 an excellent spawning and fishing stream for rainbow, cut-throat and  
26 Eastern brook trout.

1 IV

2 There are no minimum flows or base flows established by regulation  
3 for either Toroda or Nicholson Creek. The Department of Game  
4 suggested a minimum flow of 3 cfs "from the mouth of Toroda Creek  
5 upstream to the mouth of Nicholson Creek" in 1950. The Department of  
6 Game has since discredited this figure as too low because it was  
7 established as a stopgap measure and is not satisfactory, in its  
8 current judgment, to protect stream flows and the fish resource.  
9 During September 1979, which is a "dry" year, respondent estimated  
10 between 3.5 and 4 cfs at a point near the mouth of Nicholson Creek.  
11 The granting of the instant request would reduce the water available  
12 in the stream and result in a proportionate reduction of fish  
13 population in Toroda Creek already at levels presently considered only  
14 minimally acceptable by the Department of Game. Although the proposed  
15 appropriation will not by itself seriously harm the fisheries  
16 resource, the cumulative effect of other such appropriations would do  
17 so.

18 V

19 Any Conclusion of Law which should be deemed a Finding of Fact is  
20 hereby adopted as such.

21 From these Findings, the Board comes to these

22 CONCLUSIONS OF LAW

23 I

24 The only issue raised in this appeal concerns whether the instant  
25 application for appropriation of surface water is likely to prove  
26 detrimental to the public interest. RCW 90.03.290. If the  
27 appropriation would not be detrimental, then a permit should issue.

1 The evidence shows that further appropriation of any water from  
2 Nicholson Creek would result in lowering of the flow of water  
3 necessary to adequately support existing food and game fish population  
4 in Toroda Creek. It is not disputed that since the 1950's the  
5 Department of Game has consistently opposed additional appropriations  
6 in an effort to protect the remaining fisheries resource. Further,  
7 appropriations would be contrary to the policies set forth in RCW  
8 75.20.050. Additionally, the appropriation of water from Nicholson  
9 Creek would not further the purpose of preservation of the natural  
10 resources and the water resources of the State. RCW 90.54.010. As a  
11 general declaration of fundamentals, base flows necessary for the  
12 preservation of fish in perennial streams are protected and, where  
13 possible, enhanced. RCW 90.54.020(3). The instant application would  
14 not protect or enhance, but rather would be detrimental to the  
15 preservation of, the existing fish resource contrary to RCW  
16 90.03.290. Moreover, as between the competing uses, i.e., irrigation  
17 and fish preservation, we cannot say that the proposed irrigation has  
18 been shown to maximize benefits to the people of the State, serve an  
19 overriding consideration of the public interest or provide the highest  
20 feasible development of the use of public waters. RCW 90.54.020(2 and  
21 3); RCW 90.03.290.

22 In summary, we conclude that appellant has not shown that the  
23 proposed appropriation would not be detrimental to the public  
24 interest. Accordingly, the action of the Department of Ecology denying  
25 the application should be affirmed.

II

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The Department of Ecology Order denying Application No. S3-22567 is affirmed.

DATED this 7th day of February, 1980.

POLLUTION CONTROL HEARINGS BOARD

  
NAT W. WASHINGTON, Chairman

  
CHRIS SMITH, Member

  
DAVID AKANA, Member

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